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CITATIONS

715-508—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

THE AMERICAN OIL COMPANY, APPELLANT

v.

P. G. NEILL, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT AND THE UNITED STATES OF AMERICA AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho (Appendix A, *infra*, pp. 1a–23a) is reported at 383 P. 2d 350. The memorandum opinion of the District Court of the Third Judicial District of Idaho (Appendix A, *infra*, pp. 23a–33a) is not reported.

JURISDICTION

Appellant brought this action for refund of taxes paid under protest on motor fuel sold to the Atomic Energy Commission. Appellant alleged that the Idaho Motor Fuels Tax Act, as amended (9 Idaho Code 49–1201 *et seq.*) under which the taxes were imposed

is repugnant to the United States Constitution. The Supreme Court of the State of Idaho upheld the statute.

The judgment below was entered on July 11, 1963 (App. A, *infra*, p. 34a). Notice of appeal was filed in the State Supreme Court on October 4, 1963 (R. 699).[1] On November 29, 1963, that court extended the time for docketing the appeal to December 24, 1963. The jurisdiction of this Court rests on 28 U.S.C. 1257 and 2101. *Connecticut General Co.* v. *Johnson*, 303 U.S. 77; *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110.

This jurisdictional statement and any subsequent briefs will be filed jointly by the appellant and the United States[2] as *amicus curiae*. If the Court notes probable jurisdiction, appellant's time for oral argument will be used by the United States, with consent of counsel for appellant.

QUESTION PRESENTED

Whether, where a licensed Idaho dealer in motor fuels sells and transfers gasoline outside the State for importation into the State by the United States, the State of Idaho may constitutionally impose an excise tax upon the transaction on the theory that

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[1] Record references are to the typewritten record which is being filed with this jurisdictional statement.

[2] Appellant's contract for the supply of gasoline for the Atomic Energy Commission provides that the price is to be increased for any state taxes imposed (R. 346).

the dealer constructively "receives" the gasoline in Idaho upon its importation by the United States.

STATUTE INVOLVED

The relevant portions of the Idaho Motor Fuels Tax Act, as amended (9 Idaho Code 49–1201 *et seq.*) are set forth in Appendix B, *infra*, pp. 35a–38a.

STATEMENT

Utah Oil Refining Company[3] brought this action for refund of $86,181.30 representing payments to the State Tax Collector of Idaho under the Idaho Motor Fuels Tax Act. The payments were made under protest on grounds that application of the Tax Act to an out-of-state sale and delivery of gasoline to the Atomic Energy Commission is unconstitutional because it violates (1) the Due Process Clause of the Fourteenth Amendment, (2) the Commerce Clause and (3) the Supremacy Clause (App. A, *infra*, pp. 26a–27a).

1. THE TRANSACTIONS

The General Services Administration issued an invitation for bids for the supplying of gasoline for government activities in Idaho, Montana, Oregon and Washington, for the period from November 1, 1959, through October 31, 1960. The invitation included as items 63 and 64 the supplying of gasoline for AEC activities at Idaho Falls, Idaho. Appellant sub-

[3] American Oil Company, as successor to Utah Oil Refining Company, was substituted as party plaintiff (App. A, *infra*, p. 1a).

mitted formal bids to the GSA office at Seattle from its principal offices at Salt Lake City, Utah (R. 221–222), and its bids on items 63 and 64 were accepted in Seattle. Each bid was submitted in alternative form, quoting a price f.o.b. Salt Lake City and a price f.o.b. the AEC activity site in Idaho, and the contract awarded was for delivery f.o.b. Utah's bulk plant Salt Lake City (App. A, *infra*, pp. 25a–26a). The contract price did not include state taxes (R. 260) but was to be increased for any state taxes imposed (R. 346). Pursuant to orders of the AEC under the contract, appellant delivered some 1,436,355 gallons of gasoline at its bulk plant in Utah. Common carriers selected and paid by AEC transported the gasoline from Utah to government owned storage tanks in Idaho (App. A, *infra*, p. 26a). Title to the gasoline passed to the AEC at the bulk plant in Salt Lake City (App. A, *infra*, p. 8a).

2. THE IDAHO MOTOR FUELS TAX ACT

The Idaho Motor Fuels Tax Act imposes an excise tax of six cents per gallon on motor fuels. The tax is to be paid by the "dealer," who is defined by the Act as any person who first "receives" motor fuels in Idaho within the meaning of the term "received" as defined in the Act (9 Idaho Code 49–1201, 49–1210, App. B, *infra*, pp. 35a, 37a). The definition of "received" (9 Idaho Code 49–1201, as amended), provides *inter alia*—

> that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled

> Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho.

The dealer is not required to pass on the tax or collect it from the person to whom he sells the fuel or from the ultimate consumer (App. A, *infra*, p. 29a).

Pursuant to this amended provision, the Idaho Tax Collector demanded that appellant, an out-of-state corporation holding a license as a "dealer" under the Idaho Tax Act, pay the motor fuels tax on its sales of gasoline in Utah to the AEC.[4] The Company paid the taxes under protest, and instituted this action for refund (App. A, *infra*, p. 1a).

3. THE STATE COURT DECISIONS

The District Court of the Third Judicial District of the State of Idaho granted summary judgment for the appellant, holding that the tax is not a use tax, but rather "is basically upon a licensed dealer's privilege of first owning motor fuel in the state of Idaho for the purpose of sale, delivery, or consumption of the same in the state * * *"; that the taxable event is the "receipt" of the gasoline by the dealer; that under the facts of this case the tax is one on a privilege which was exercised and performed wholly

[4] AEC was not, during the period in question, and never has been, the holder of an uncanceled Idaho dealer permit.

outside of the State of Idaho; and that as such its imposition is a violation of the Commerce Clause and Due Process Clause (App. A, *infra*, pp. 29a–31a).

On appeal, the Supreme Court of Idaho reversed, stating (App. A, *infra*, pp. 7a–8a)—

> The passage of title to the fuels is not the criterion upon which the tax operates; the incident which establishes the liability for payment of the tax by the licensed dealer is its "receiving" the fuels. The statute creates a continuing obligation on the dealer as to fuels sold, supplied, or furnished outside of this state for importation herein. This obligation of the first licensed dealer is only discharged upon its transacting of business with another licensed dealer, or by payment of the tax.

The Court held that the requirements of the Commerce and Due Process Clauses were satisfied by (1) the fact that the appellant had subjected itself to the jurisdiction and control of the State of Idaho when it became authorized to do business there, and additionally when it became an Idaho "dealer," and (2) the fact that the gasoline was intended for use in Idaho (App. A, *infra*, p. 19a).

THE QUESTION IS SUBSTANTIAL

This appeal presents the question whether Idaho may constitutionally impose an excise tax upon an out-of-state transfer of gasoline where the State's only relationship to the transaction is as follows: the vendor is authorized to do business in Idaho and holds a license from the State as a "dealer" in motor

fuels; and the vendee, an official agency of the United States, carries on activities in Idaho and purchased the gasoline for subsequent shipment into Idaho. We submit that the Supreme Court of Idaho erred in holding that the tax is constitutional.

Under the Due Process Clause of the Fourteenth Amendment, a State has no power to tax transactions which occur outside its borders. *Union Transit Co.* v. *Kentucky*, 199 U.S. 194; *Connecticut General Co.* v. *Johnson*, 303 U.S. 77. Idaho has attempted to avoid this bar and to turn an obviously out-of-state transaction into an intrastate one by assumption of a completely fictitious state of facts. Although motor fuel was sold and delivered by appellant outside the State, Idaho's Tax Act deems that the appellant "received" the gasoline inside Idaho upon its importation by the United States. Clearly, the State Supreme Court should have rejected the fiction and recognized the tax for what it is—a prohibited tax on an out-of-state transaction. Nor may the tax be sustained as a tax upon the licensed dealer's privilege of controlling the importation of gasoline into Idaho. This would be a tax upon the privilege of engaging in interstate commerce, forbidden by the Commerce Clause. *Robbins* v. *Shelby Taxing District*, 120 U.S. 489; *Spector Motor Service* v. *O'Connor*, 340 U.S. 602; *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534. On the other hand, if the tax is one upon the use of the gasoline inside Idaho with the "dealer" serving merely as a collector, it is invalid under the Supremacy Clause as a direct tax on the United States. *Mc-*

Culloch v. *Maryland*, 4 Wheat. 316. See *United States* v. *Allegheny County*, 322 U.S. 174, and cf., *United States* v. *City of Detroit*, 355 U.S. 466.

1. It is well settled that the Due Process Clause of the Fourteenth Amendment forbids a State to tax activities which occur outside its borders. *Union Transit Co.* v. *Kentucky*, 199 U.S. 194. The appellant's transfer of gasoline to the AEC was clearly an out-of-state transaction with respect to Idaho. Each and every activity by the appellant necessary to the transaction occurred outside Idaho: invitations for bids were issued in Seattle, Washington; appellant submitted its bids from Salt Lake City to Seattle and they were accepted in Seattle; the contract was for delivery of the gasoline f.o.b. Salt Lake City; and appellant delivered the gasoline and relinquished title to the AEC at ~~the latter's~~ appellant's bulk plant in that city. Appellant did not perform a single act, in the course of soliciting, consummating or performing the contract of sale which took place inside Idaho or which was dependent in any degree on the grace of that State.

Thus, the Due Process Clause appears to bar imposition of the tax unless there are some other local incidents of the transaction which bring it within Idaho's taxing power. The court below found such incidents in the following facts:

(1) That the appellant had been authorized to do business in the State of Idaho and had applied for and been granted a dealer's permit "to con-

trol the distribution of the motor fuels throughout the state"; and

(2) That the appellant had sold the gasoline for importation by the AEC into Idaho.

In our judgment these facts do not afford any basis for sustaining Idaho's contention that this out-of-state transaction is subject to its taxing powers.

The fact that appellant was licensed by Idaho as a dealer in motor fuels and authorized to do business in the State has no logical relationship to this particular transaction. Indeed, appellant—the Utah Oil Company at the time of the transaction—customarily did business in Utah and made deliveries, as it did here, at its bulk plant in Salt Lake City. Thus, the initiation and completion of the transaction in Utah was in no sense out-of-the-ordinary. Moreover, appellant did not need an authorization from Idaho to engage in the transfer, and Idaho could not have conditioned importation by the United States upon purchase from a licensed dealer.[5] Although appellant happened to hold an Idaho dealer's permit, there were Utah distributors which did not. Had the United States chosen to purchase its gasoline from one of these concerns, Idaho would have had no claim to a tax under its Act, yet the fundamental relationship to the transaction would have been no different than here. The obvious competitive advantage afforded such concerns

[5] See *Atlantic & Pac. Tea Co.* v. *Grosjean*, 301 U.S. 412, 424, where the Court stated:

"The state may not tax real property or tangible personal property lying outside her borders; nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed. * * *"

serves to underscore the government's point that the Idaho tax imposes an undue burden upon the out-of-state operations of appellant and all other dealers licensed in Idaho.

2. The fact that the appellant supplied the gasoline for subsequent importation into Idaho and that the tax was imposed only upon the occasion of such importation does not validate the tax, as the Supreme Court of Idaho concluded. The attempt to justify the tax on this ground merely emphasizes what is clear from the wording of the statute and its application in the circumstances of this case, that the tax falls directly on interstate commerce. It is well established that a direct tax on an interstate transaction or on the privilege of engaging in such a transaction is unconstitutional as a burden on the flow of commerce between the states. *Robbins* v. *Shelby Taxing District,* 120 U.S. 489; *Spector Motor Service* v. *O'Connor,* 340 U.S. 602; *Norton Co.* v. *Dept. of Revenue,* 340 U.S. 534.

Thus, the provision of the Idaho Tax Act at issue here imposes an excise tax of six cents per gallon upon licensed Idaho dealers in motor fuel who sell such fuel to unlicensed persons for importation into Idaho. In upholding the constitutionality of the tax, the State Supreme Court held (App. A, *infra,* p. 19a)—

> The process by which the funds are raised is by placing the immediate burden of the tax on those who are first in a position to control the distribution of the motor fuels throughout the state—on the "dealers" * * *.

Since in fact the tax is one on a dealer who sells fuel outside the State for shipment into the State, a more accurate description would be that the tax is on the privilege of controlling importation of motor fuels into the State—*i.e.*, it taxes the right to control fuel outside the State in such a manner as to introduce it into the stream of commeree between the State of sale and the State of Idaho. As the Idaho District Court held, this is an unconstitutional attempt to tax the privilege of doing interstate business (App. A, *infra*, p. 31a).*

The fact that a vendor is authorized or licensed to do intrastate business—and is therefore subject to the taxing power of the State—has never been held to afford a basis for the State to exact a tax upon the vendor's interstate operations. The Court made

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* Where this Court has upheld taxes on in-shipments from a point outside the taxing State, it has been because the direct burden of the levy was laid on some incident, activity or use within the taxing State. Cf. *Henneford* v. *Silas Mason Co.*, 300 U.S. 577; *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, and *McGoldrick* v. *Felt & Tarrant Co.*, 309 U.S. 70. In each of the latter cases, the Court approved a New York City sales tax imposed upon out-of-state vendors who delivered the subject goods to the buyer within the jurisdictional confines of the city. The Court said (309 U.S. at 43–44):

"The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast upon him. It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, 'consummated' there, for the transfer of title, or possession. * * *"

this clear in *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307. In that case, Indiana sought to impose a gross income tax on a domiciliary corporation with its headquarters, factory and principal place of business in that State but which shipped 80 percent of its goods to out-of-state buyers. This Court held the tax invalid as applied, stating (p. 311):

> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. * * *

Where a taxpayer is engaged in both interstate and intrastate business, it is not subject to direct taxation of its interstate activities. *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534. See also *McLeod* v. *Dilworth Co.*, 322 U.S. 327.

To uphold this tax on the ground that appellant had been granted a dealer's permit to distribute motor fuels throughout Idaho would in effect permit a State to tax a company's out-of-state business as a cost of doing intrastate business. This is virtually the identical evil which was condemned in *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1, where a State franchise tax measured in part by the value of the taxpayer's prop-

erty outside the State was held to be a direct burden on the company's interstate operations.

Scripto v. *Carson,* 362 U.S. 207, upon which the court below placed primary reliance (App. A, *infra,* pp. 20a, 21a), does not sustain the tax. There, a Georgia corporation with no place of business in Florida and no property or regular full-time employees in that State had 10 wholesalers or jobbers who solicited sales of its products on a commission basis. Orders were forwarded to Georgia where they were accepted and goods were shipped from Georgia to Florida residents. The Court held that the Florida tax on the *use* of these products in Florida was not repugnant to the Commerce Clause or the Due Process Clause even though it made the Georgia corporation responsible for tax collection from the Florida purchasers. However, the holding in *Scripto* is inapplicable here for several reasons: (a) In *Scripto* the State of Florida had a direct connection with the sales transactions since 10 wholesalers or jobbers were continuously soliciting in Florida. Here the sale was made and title passed outside Idaho, and the transaction was not the result of solicitation in Idaho or dependent in any other respect upon happenings in Idaho; (b) In *Scripto* the Georgia dealer was charged with no tax except when he failed to collect from his Florida customers; here the incidence of the tax is wholly upon the dealer who, as the district court recognized, is not taxed as a collector; (c) In *Scripto,* the tax was imposed on the use of the goods in Florida; here the tax could not be sustained as a use tax as the only user is the AEC.

3. If the tax is a use tax for which the dealer serves merely as collector, as the opinion of the State Supreme Court suggests,[1] it is invalid as a direct tax on the United States. Since the United States held title to the gasoline at all times in the State and was the user, a use tax would be invalid under the Supremacy Clause as a direct tax upon use of its own property by the United States. *United States* v. *Allegheny County*, 322 U.S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110; *United States* v. *Livingston*, 179 F. Supp. 9 (E.D. S.C.), affirmed, 364 U.S. 281.

In conclusion, Idaho cannot tax the sale of the gasoline, since that took place in Utah; Idaho cannot tax the use of the gasoline, since that use was by the United States; Idaho cannot tax the receipt of the gasoline, since it was the United States and the United States only which received it in Idaho. Nor can Idaho tax the fuel by means of a transparent fiction that the fuel was "received" upon being unloaded in Idaho by the seller, whose actual last connection with the fuel was its delivery to the United States in Utah.

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[1] The Supreme Court stated (App. A, *infra*, p. 19a):

"Here we are dealing with an excise tax, the purpose of which is to exact a proportionate amount from the users of the highways of this state for a specific purpose,—that of building and maintaining public highways within the state. * * * The process by which the funds are raised is by placing the immediate burden of the tax on those who are first in a position to control the distribution of the motor fuels throughout the state—on the 'dealers' as that term is defined by the statute. * * * The gasoline, the subject of the tax, was for use in Idaho. * * *"

CONCLUSION

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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DECEMBER 1963.

715-503—63——3

APPENDIX A

Opinion of the Supreme Court of the State of Idaho

THE AMERICAN OIL COMPANY, A MARYLAND CORPORATION, PLAINTIFF-RESPONDENT, AND CROSS-APPELLANT

v.

P. G. NEILL, FORMER TAX COLLECTOR OF THE STATE OF IDAHO, AND FLOYD WEST, ACTING TAX COLLECTOR OF THE STATE OF IDAHO, DEFENDANTS-APPELLANTS AND CROSS-RESPONDENTS

McFADDEN, *J.*

This action, originally brought by Utah Oil Refining Company, is to recover motor fuels tax payments made under protest to P. G. Neill, State Tax Collector. The payments were made during the period between January and November, 1960, for motor fuels delivered between November 1, 1959 and October 30, 1960. Subsequent to instituting the action The American Oil Company, as successor of Utah Oil Refining Company, was substituted as the plaintiff; P. G. Neill resigned as Tax Collector of the State of Idaho, and Vernon Drown was appointed as acting Tax Collector of the State; Mr. Drown died in office, and Floyd West was later appointed as the Tax Collector of the State, and named herein as party defendant.

Defendant moved to dismiss the plaintiff's complaint; plaintiff moved for summary judgment, and defendant moved to dismiss the plaintiff's motion for summary judgment. The summary judgment was entered for the plaintiff in the principal amount

prayed for, but without interest. The judgment provided, inter alia:

> That the Defendants, P. G. Neill, former Tax Collector of the State of Idaho, and Vernon E. Drown, Acting Tax Collector of the State of Idaho, and each of them, are hereby directed to refund and pay, or cause to be paid, to the Plaintiff, the American Oil Company, a corporation, the sum of $86,181.30 hereby found to have been illegally and erroneously demanded and collected from the Utah Oil Refining Company, a corporation, predecessor in interest to the Plaintiff herein, as motor fuels taxes upon the transaction set forth in the complaint and supplemental complaints on file herein, *Provided however*, That this judgment shall not be satisfied out of the individual property of said Defendants or either of them.

Defendants appealed from the summary judgment and plaintiff cross appealed from that portion of the summary judgement refusing plaintiff any interest, from the portion thereof holding the defendants not personally liable, and denying plaintiff its costs;

The defendants' assignments are as follows:

> 1. The court erred in ruling and accordingly deciding that the federal commerce clause is involved, ruling that title to gasoline passed outside the State of Idaho and was imported into the State by its owner, on grounds and for the reasons that said ruling and holding is contrary to the evidence adduced and the law of the case.
>
> 2. The court erred in ruling and accordingly holding that title 49, chapter 7 of the Idaho Code and particularly I. C. § 49–1201 as amended 1959 cannot be construed to impose a motor fuels tax upon appellant herein on account of its attempted passage of title outside of the State of *Utah* [sic], when in truth and in fact the parties intended to, and they did

pass title within the State of Idaho, and therein use and consume the gasoline.

3. The court erred in ruling and accordingly holding that the Federal Government is the ultimate consumer and therefore sovereign immunity to taxation applies on grounds and for the reasons that such holding is contrary to the facts adduced and the law in such [case] made and provided.

Defendant summarize their position on this appeal by recital of the following two issues:

1. In instances where the ultimate consumer is the Government of the United States of America, can the state impose a motor fuel tax?

2. Is the sovereign State of Idaho bound by the language of the contract or award between the respondent and the agent for the Atomic Energy Commission, or may this court view the transaction as a whole and determine by the actual conduct of the parties that title to the gasoline in question passed at Arco, Idaho rather than in Utah?

In order to understand the position of the respective parties concerning these assignments of error, a rather detailed statement of the facts leading to this litigation is essential.

The Federal Government, acting through the Atomic Energy Commission (referred to as the A.E.C.) operates facilities at Idaho Falls, and at the National Reactor Testing Station northwest from Idaho Falls.

The Phillips Petroleum Company is a contractor with the A.E.C. and on its behalf actually performs certain required services, including the operation of busses between Idaho Falls, and the National Reactor Testing Station. The gasoline, the basis of the controverted tax, was consumed in motor vehicles owned by the Federal Government, and used in transporting per-

sonnel connected with the A.E.C. A fee was charged for the transportation of persons using the Government busses, which fee accrued to the use and benefit of the Government. Losses involved in operating the busses were fully absorbed by the Government.

The Federal Government by the General Service Administration, a Federal agency, (sometimes referred to as G.S.A.) issued invitation for bids for supplying gasoline for activities in Idaho, Montana, Oregon and Washington, for the period from November 1, 1959 through October 31, 1960. Included in this invitation (along with other items) were items Nos. 63 and 64 covering the needs for gasoline for the A.E.C., at Idaho Falls, and at the National Reactor Testing Station. Utah Oil Refining Company, submitted its formal bid on these items (with other bid items) to the General Service Administration office at Seattle, Washington.

On September 15, 1959, the G.S.A. accepted Utah Oil Refining Company's bid for listed items Nos. 63 and 64. In the bid as sumbitted, the bidder stated that the Idaho State tax of $.06 per gallon was included in the bid. Both items Nos. 63 and 64 were submitted in alternative forms.

Item No. 63 was for 200,000 gallons of gasoline for Idaho Falls, with tank truck delivery quoted. The first alternative bid was as follows:

(a) f.o.b. bulk plant posted price date of bid $.1905 Location of bulk plant Salt Lake City.

Under this alternate bid maximum price per gallon, after deductions was $.1580 per gallon "Ex. State Tax." The other alternate was as follows:

(b) f.o.b. activity, transport truck delivered price date of bid: $.2755.

Under this alternate bid, the maximum price per gallon, after deductions was $.2418 per gallon.

Item No. 64 was for 1,000,000 gallons of gasoline for the National Reactor site with identical alternates, except for prices quoted.

The A.E.C. through its operating agent periodically placed orders under the contract for delivery of the gasoline at the bulk plant at Salt Lake City. Common carriers selected and paid by the A.E.C. transported the gasoline from Utah to government owned storage tanks in Idaho. Monthly thereafter Utah Oil Refining Company, submitted the reports required by I.C. § 49-1210, and paid under protest to the State Tax Collector the $.06 per gallon Motor Fuels Tax. Utah Oil Refining Company, a Delaware Corporation, authorized to do business in Idaho, was a licensed dealer as defined by the provisions of that chapter. The A.E.C. is not a licensed dealer. The status of Phillips Petroleum Company, as a licensed dealer, is immaterial to this decision, for its status is only that of a contractor of the A.E.C., at the Idaho Falls and National Reactor Testing station.

In 1933 the Legislature of Idaho enacted an excise tax on motor fuels, which act, later amended in subsequent legislative sessions is not contained in Chapter 12, Title 49, Idaho Code, with the "Special Fuel Use Tax Act" (S.L. 1953, Ch. 262). The 1933 act, as amended, fixes an excise tax on motor fuels. A "dealer" in motor fuels is defined as any person, (which includes individuals, firms, corporations, etc.), who first receives motor fuels in this state, as the term "received" is there defined.

All dealers are required to hold a permit by the State Tax Collector, issued upon application and posting of bond conditioned on compliance with the law. Such permit is required before any person can import, receive, use, sell or distribute motor fuels; non-com-

pliance with the law subjects any persons to criminal penalties and civil liabilities.

Each dealer is required to report monthly the gallonage of all motor fuels received for the preceding month, and to pay the $.06 per gallon tax. Provisions are made for deductions from the gallonage reported for fuels exported, fuels sold or used in aircraft (which fuels bear a different tax), and fuels used in a non-highway activities, plus a 2% shrinkage allowance. The proceeds of the tax are paid by the Tax Collector to the State Treasurer for deposit in the dedicated highway funds of the state, including a special fund to be used for payment of lawful refunds of the tax. Excepting for the fuels contained in the fuel tank of a vehicle, the act requires payment of the tax by the vehicle owner on all fuels imported into the state by motor vehicles, in the event of failure of the "dealer", or "individual". for whom the importation is made, to pay the tax.

By amendments to the 1933 act the excise tax becomes due when the motor fuel is "received" by a licensed dealer. The 1959 amendment (S.L. 1959, Ch. 75), here involved, provides:

> I.C. § 49–1201—Definitions. * * *.
>
> * * * * * *
>
> (g) * * * Motor Fuel, for the purpose of determining liability for the payment of the tax imposed by section 49–1210, shall be considered to be "received" in the following cases:
>
> 1. * * *.
>
> 2. Motor fuel imported into this state other than that placed in storage at refineries or pipe line terminals in this state shall be considered to be received immediately after the same is unloaded and by the person who is the owner thereof at such time if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who

owned such fuel immediately prior to its being unloaded; provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; *further provided that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho.* * * * [Emphasis added.]

Here the motor fuels on which the tax was paid were sold or supplied to an agency, not a holder of an uncanceled dealer permit, for importation into this state from Utah. These facts bring this action directly into the purview of the portion of the statute above underlined. The motor fuels sold, under the provisions of the act, must thus be considered to have been received by the Utah Oil Refining Company, for tax purposes, the moment the imported fuels were unloaded in the State of Idaho.

It must be pointed out that this section of the statute makes no distinction between the case where an Idaho dealer sells, inside the State, to an unlicensed person, from the case where he sells, supplies or furnishes the fuels to an unlicensed person for importation into the State. The passage of title to the fuels is not the criterion upon which the tax operates; the incident which establishes the liability

for payment of the tax by the licensed dealer is its "receiving" the fuels. The statute creates a continuing obligation on the dealer as to fuels sold, supplied, or furnished outside of this state for importation herein. This obligation of the first licensed dealer is only discharged upon its transacting of business with another licensed dealer, or by payment of the tax.

It is contended by respondents, as pointed out by the trial court in its memorandum, that title to the gasoline passed from Utah Oil Refining Company to the A.E.C. at the bulk plant in Salt Lake City. The trial court and respondent are correct in this conclusion. When title passes is a question of intention of the parties. Uniform Sales Act, § 18; Utah Code Annotated § 62–2–2; Shipman v. Klopenburg, 72 Idaho 321, 240 P.2d 1151; Union Portland Cement Co., v. State Tax Commission (Utah), 170 P.2d 164, modified on rehearing on unrelated issue, 176 P.2d 879.

There is presented in this case the principal issue whether the statute in question impinges upon the Commerce Clause, (U.S. Const. Art. 1 § 8(3)), and upon the Due Process Clause of the Fourteenth Amendment. It is further contended that the imposition of this tax violates the due process clause of Idaho Constitution, Art. 1 § 13. In considering these constitutional questions it is essential to bear in mind that the burden of showing unconstitutionality of a statute is upon the party asserting it, and the invalidity must be clearly shown. Eberle v. Nielson, 78 Idaho 572, 306 P. 2d 1083; Curtis v. Pfost, 53 Idaho 1, 21 P. 2d 73; Boughton v. Price, 70 Idaho 243; 215 P. 2d 286; Rich v. Williams, 81 Idaho 311, 341 P. 2d 432; Caesar v. Williams, 84 Idaho 254, 371 P. 2d 241. A legislative act is presumed to be constitutional and

all reasonable doubt as to its constitutionality must be resolved in favor of its validity. Sanderson v. Salmon River Canal Co., 45 Idaho 244, 263 Pac. 32; Wanke v. Ziebarth Const. Co., 69 Idaho 64, 202 P. 2d 384; Rich v. Williams, supra; Caesar v. Williams, supra.

Plaintiff asserts that this tax cannot be sustained against the constitutional challenge on the theory that it is a "sales" tax, for the reason that the "sale" took place outside the state and a tax on it would violate the due process clause of the Federal Constitution, relying upon McLeod v. J. E. Dilworth Co., 322 U.S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304. Plaintiff also claims this tax cannot be sustained upon the theory that it is a "use" tax, for the "use" is by an agency of the Federal Government, immune from imposition of taxes by the State.

The legal issues raised by those contentions have been serious and difficult ones for the Supreme Court of the United States and have been the subject of numerous articles by legal writers. See: October 1960 issue of Virginia Law Review, (46 Va. Law Rev. pgs. 1051 et seq.). The Supreme Court has discussed the basic problem of the commerce clause in these words:

> The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166, 74 S. Ct. 396, 98 L. Ed. 583.
>
> Commerce between the States having grown up like Topsy, the Congress meanwhile not having undertaken to regulate taxation of it, and

the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. This Court alone has handed down some three hundred full-dress opinions spread through slightly more than that number of our reports. N. W. States Portland Cement Co. v. State of Minn., 358 U.S. 450, 457; 79 S. Ct. 357, 3 L. Ed. 2d 421.

Paul J. Hartman, Professor of Law, Vanderbilt University, in his article, "State Taxation of Interstate Commerce," 46 Va. Law Review, 1051, at page 1059, in discussing the effect of the due process clause states:

> * * * The restraining power of the due process clause, it might be said, keeps the taxing power at home. It prevents a state from fixing its tax talons on extra-territorial values. The absence of any sufficient "nexus" or connection in fact between the taxed business and the taxing state would be enough in itself for upsetting a tax on due process grounds. The term "nexus" has become an indespensible part of the tax vocabulary, when reference is to the requisites of the due process clause as applied to state and local taxation of multistate operations. Consistent with these nexus requirements a state can exert its taxing power only in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred. * * * (Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267.)

In McLeod v. J. E. Dilworth Co., supra, the Supreme Court struck down as unconstitutional the Arkansas sales tax when applied to an order solicited by a drummer for a Tennessee company. It was held that Arkansas could not collect a sales tax when the order was solicited by a drummer in that state for acceptance in Tennessee by the seller, who then shipped the goods directly to the Arkansas buyer, title passing in Tennessee. The court agreed that a sales tax might have the same result as a use tax, but rejected the argument that the sales tax could be sustained because the seller would have been required to pay a use tax to Arkansas. In discussing the distinction between a "sales" tax and an "use" tax, the court stated:

> A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation, of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.

> The difference in substance between a sales and a use tax was adverted to in the leading case sustaining a tax on the use after a sale had spent its interstate character: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself." Henneford v. Silas Mason Co., 300 U.S. 577, 583, 81 L. Ed. 814, 819, 57 S. Ct. 524. Thus we are not dealing with matters of nomenclature even though they be matters of nicety. 'The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the federal Constitution; neither can it render unconstitutional a tax that in its actual effect violates no constitutional provision, by inaccurately defining it.' Wagner v. Covington, 251 U.S. 95, 102, 64 L. Ed. 157, 167, 40 S. Ct. 93. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State.

The distinction between these two types of tax as discussed by the majority opinion in McLeod v. J. E. Dilworth Co., supra, was rejected by Mr. Justice Douglas in his dissenting opinion in that case, where he stated:

> It is not enough to say that the use tax and the sales tax are different. A use tax may of course have a wider range of application than a sales tax. Henneford v. Silas Mason Co., 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524. But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence.

It is noteworthy that the same day the opinion in McLeod v. J. E. Dilworth Co., (supra) was an-

nounced, the Supreme Court of the United States rendered its opinion in General Trading Co. v. State Tax Comm'n., 322 U.S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309. The majority opinion in both of these cases was written by Mr. Justice Frankfurter. The end result of these two cases was that insofar as the imposition of a use tax was concerned when imposed in a business involved in interstate commerce, such was not unconstitutional as being discriminatory against interstate commerce, or contrary to the due process provision, but that a sales tax would be.

In General Trading Co. v. State Tax Comm'n. (supra) the Iowa Tax Commission brought suit in an Iowa court against General Trading Co., for taxes assessed under the Iowa use tax law with respect to tangible personal property sold and delivered to Iowa "users" of the property. General Trading was a Minnesota corporation, and had not qualified to do business, and did not maintain any office, branch or warehouse, in Iowa. The property in respect of which the use tax was levied was sent to Iowa in response to orders solicited and obtained by salesmen traveling into Iowa from their Minnesota headquarters. The orders were subject to acceptance in Minnesota, after which the goods were sent to Iowa by common carrier. As stated above, the Supreme Court held such tax did not violate the federal constitution, although it again reiterated that "—no State can tax the privilege of doing interstate business * * *. That is within the protection of the Commerce Clause and subject to the power of Congress."

Mr. Justice Rutledge specially concurred in General Trading Co. v. State Tax Comm'n., supra, and in International Harvester Co. v. Department of Treasury, 322 U.S. 340, 64 S. Ct. 1019, 88 L. Ed. 1313 (opinion

being rendered the same day) and dissented in McLeod v. J. E. Dilworth, supra. In his special opinion discussing these cases, he points out with clarity the danger of categorizing of any one type of tax as "sales" or "use", as follows:

> The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in the one case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.
>
> It would seem obvious that neither tax of its own force can impose a greater burden upon the interstate transaction to which it applies than it places upon the wholly local trade of the same character with which that transaction competes. By paying the Arkansas tax the Tennessee seller will pay no more than an Arkansas seller of the same goods to the same Arkansas buyer; and the latter will pay no more to the Tennessee seller than to an Arkansas vendor, on account of the tax, in absorbing its burden. The same thing is true of the Iowa tax in its incidence upon the sale by the Minnesota vendor. The cases are not different in the burden the two taxes placed upon the interstate transactions. Nor in my opinion are they different in the existence of due process to sustain the taxes.
>
> "Due process" and "commerce clause" conceptions are not always sharply separable in dealing with these problems. Cf. e.g., Western U. Teleg. Co. v. Kansas, 216 U.S. 1, 54 L. Ed. 355, 30 S. Ct. 190. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes "undue". But, though overlapping, the

two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones.

Thus, in the case from Arkansas no more than in that from Iowa should there be difficulty in finding due process connections with the taxing state sufficient to sustain the tax. As in the Iowa case, the goods are sold and shipped to Arkansas buyers. Arkansas is the consuming state, the market these goods seek and find. They find it by virtue of a continuous course of solicitation there by the Tennessee seller. The old notion that "mere solicitation" is not "doing business" when it is regular, continuous and persistent is fast losing its force. In the General Trading Co. Case it loses force altogether, for the Iowa statute defines this process in terms as "a retailer maintaining a place of business in this state." The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. There is no difference between the Iowa and the Arkansas situations in

this respect. Both involve continuous, regular, and not intermittent or casual courses of solicitation. Both involve the shipment of goods from without to a buyer within the state. Both involve taxation by the state of the market. And if these substantial connections are sufficient to underpin the tax with due process in the one case, they are also in the other.

In discussing the effect of the commerce clause of the Federal Constitution, Justice Rutledge points out:

> When, however, the issue is turned from due process to the prohibitive effect of the commerce clause, more substantial considerations arise from the fact that both the state of origin and that of market exert or may exert their taxing powers upon the interstate transaction. The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burder interstate commerce. This resolves itself into various collary formulations. One is that a state may not single out interstate commerce for special tax burden. (citing cases). Nor may it discriminate against interstate commerce and in favor of its local trade. (citing cases). Again, the state may not impose cumulative burdens upon interstate trade or commerce. (citing cases). Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.

The Supreme Court of the United States subsequently was presented with a similar problem in Miller Bros v. Maryland, 347 U.S. 340, 74 S. Ct. 535, 98 L. Ed. 744. That case involved taxation of Miller Bros., a Delaware corporation, under a Maryland "use" tax.

The corporation operated a store in Delaware; some of its Maryland customers came to Delaware, made their purchases and took the purchases home. In some cases the purchases were delivered to the Maryland customers by common carrier. Miller Bros. advertised in Delaware newspapers and radio stations, and also mailed sales circulars to its customers, including the Maryland residents. Upon failure of the corporation to collect and remit the Maryland use tax on its sales to Maryland customers and, seeking to enforce this obligation, the state of Maryland attached one of the Miller Bros., delivery trucks. The Supreme Court held the tax invalid. In reconciling this result with the General Trading Company case the Court through Mr. Justice Jackson, stated:

> * * * But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market. That these inhabitants incurred a liability for the use tax when they used, stored or consumed the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign mer-

chant in the absence of some jurisdictional basis not present here.

Justice Douglas' dissenting opinion in McLeod v. J. E. Dilworth Co., supra, and Justice Rutledge's special opinion wherein he concurred in General Trading Co. v. State Tax Comm'n., and International Harvester Co. v. Department of Treasury, and also dissented in McLeod v. J. E. Dilworth, are quoted from at length herein, because in our opinion the basic judicial philosophy disclosed therein became the rationale of the Supreme Court's later opinion in Scripto, Inc., v. Carson, hereinafter discussed.

Again a similar problem was presented the Supreme Court in Scripto, Inc., v. Carson, 362 U.S. 207, 80 S. Ct. 619, 5 L. Ed. 660. In that case, a Georgia corporation, having no office, distributing warehouse, or other place of business in Florida, and having no bank account, stock of goods, regular employees or agents in or salesman traveling into Florida, shipped merchandise, f.o.b. Atlanta, to Florida customers, pursuant to orders solicited by Florida wholesalers or jobbers. The wholesalers or jobbers were independent contractors working on a commission basis, with no authority to make collections on behalf of Scripto, Inc.

The majority opinion, in reconciling the holding with Miller Bros. v. Maryland, supra, stated:

> Appellant earnestly contends that Miller Bros. Co. v. Maryland, supra, is to the contrary. We think not, Miller had no solicitors in Maryland; there was no "exploitation of the consumer market"; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware. True, there was an "occa-

sional" delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. This led the court to conclude that Miller would be made "more vulnerable to liability for another's tax than to a tax on itself." 347 U.S. at 346. In view of these considerations, we conclude that the "minimum connections" not present in Miller are more than sufficient here.

Here we are dealing with an excise tax, the purpose of which is to exact a proportionate amount from the users of the highways of this state for a specific purpose,—that of building and maintaining public highways within the state. Union Pac. R.R. Co. v. Riggs, 66 Idaho 677, 166 P. 2d 926. State v. Boise City, 57 Idaho 507, 66 P. 2d 1016. The process by which the funds are raised is by placing the immediate burden of the tax on those who are first in a position to control the distribution of the motor fuels throughout the state—on the "dealers" as that term is defined by the statute. The relationship between the State of Idaho, Utah Oil Refining Company, and this tax is more than a casual connection. The gasoline, the subject of the tax, was for use in Idaho. Utah Oil Refining Company, a Delaware corporation, subjected itself to the jurisdiction and control of the state of Idaho, when it became authorized to do business herein, and additionally so when it applied for and was granted a "dealer's" permit authorizing it to enter into the Idaho market as a distributor of motor fuels,—authorizing it to

engage in the very activity it now claims is exempt from the tax.

These connections between Utah Oil Refining Company, and the state of Idaho, or the "nexus" are more than incidental. The contract itself, between that oil company and General Service Administration, by the bid items Nos. 63 and 64, was phrased in the alternate for delivery of the gasoline either at the facility or at the bulk plant.

The line of demarcation between the cases where sufficient nexus is found to uphold a particular tax, and the cases of such insufficiency of nexus as to invalidate a tax on constitutional grounds, is a tenuous and intangible one. Here, this connection is more substantial and evident than that found in the case of Scripto, Inc., v. Carson, supra; it cannot be said this tax violates the due process clause of either the United States or the Idaho constitutions.

In State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267; the Supreme Court of the United States, speaking through Justice Frankfurter, stated:

> The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of techni[illegible] phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. * * * That test is whether property was taken without due process of law, or, if paraphrase

> we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. * * *

In the case at bar it is difficult to discern a clear violation of the commerce clause of the Federal Constitution. The inhibition against imposition of a tax upon interstate commerce is not as to the tax itself, but only when the tax becomes an undue burden upon interstate commerce, or when it discriminates against the out of state, as compared to the intrastate vendor. Halliburton Oil Company, Well Cementing Co., v. Reily, (U.S. Sup. Ct. May 13, 1963) 83 S. Ct. 1861. It cannot be said that there is any discrimination between Utah Oil Refining Company as compared to a local "dealer"; both are subject to an identical tax burden as it relates to the importation, receiving or sale of gasoline. No undue burden on interstate commerce is disclosed by this tax; therefore it is not in violation of the commerce clause of the Federal Constitution. Scripto Inc., v. Carson (supra), General Trading Co. v. State Tax Commission (supra).

This appeal presents one remaining issue. Plaintiff asserts that the incidence or burden of this tax falls on an agency of the Federal Government, and hence it cannot be levied against Utah Oil Re-

fining Company, as vendor of the gasoline to the Atomic Energy Commission. Alabama v. King & Boozer, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3, 140 A.L.R. 615, held that the constitutional immunity of the United States from state taxation was not infringed by the exaction of a state sales tax, with which the seller is chargeable but which he is required to collect from the buyer, in respect of materials purchased by a contractor with the United States on a cost plus basis. This was held to be true notwithstanding that under the contract the title to such materials was in the United States on shipment by the seller. In a series of three cases, the Supreme Court of the United States ruled that a Michigan state statute, authorizing taxation of property of he Federal Government held by a private party and used in fulfilling governmental contracts, was not unconstitutional. United States v. City of Detroit, 355 U.S. 466, 78 Sup. Ct. 474, 2 L. Ed. 2d 424; United States v. Muskegon, 355 U.S. 484, 78 Sup. Ct. 483, 2 L. Ed. 2d 436; Detroit v. Murray Corp., 355 U.S. 489, 78 S. Ct. 458, 2 L. Ed. 2d 441. In United States v. City of Detroit, supra, it was stated:

> This Court has held that a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress. McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; Van Brocklin v. State of Tennessee, 117 U.S. 151, 6 S. Ct. 670, 29 L. Ed. 845. At the same time it is well settled that the Government's constitutional immunity does not shield private parties with whom is does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government. Sec. e.g., James v. Dravo Contracting Co., 302 U.S. 134, 58 S. Ct. 208, 82

L. Ed. 155; Graves v. People of State of New York ex rel. O'Keefe, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927; Alabama v. King & Boozer, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3. * * *

We therefore conclude that the tax immunity of the Atomic Energy Commission, if such there be, does not extend to the contractor furnishing the supplies. See: Esso Standard Oil Co. v. Evans, 345 U.S. 495, 73 S. Ct. 800, 97 L. Ed. 1174; Alabama v. King & Boozer, supra; United States v. Detroit, supra; United States v. Muskegon, supra; Detroit v. Murray Corp., supra.

The summary judgment of the trial court is reversed and the trial court is instructed to dismiss the action.

Costs to appellant.

KNUDSON, C.J., MCQUADE, TAYLOR, JJ., AND DUNLAP, *D.J.*, concur.

Memorandum Decision of the District Court of the Third Judicial District of the State of Idaho

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THE AMERICAN OIL COMPANY, A MARYLAND CORPORATION, PLAINTIFF

vs.

P. G. NEILL, AS TAX COLLECTOR OF THE STATE OF IDAHO, DEFENDANT

The above entitled action is now pending before this Court upon a number of motions. These are:

1. Defendant's motion to dismiss on the ground that plaintiff's complaint does not state a claim upon which relief can be granted.

2. Plaintiff's motion for summary judgment on the ground that there are no genuine issues of material fact in dispute and that plaintiff is entitled to a judgment as a matter of law.

3. Defendant's motion to dismiss plaintiff's motion for summary judgment on the basic ground that these are matters solely within the knowledge of plaintiff and others which are material to the issues, which defendant cannot at this time produce in opposition to plaintiff's motion for summary judgment; or, in the alternative, that defendant be granted additional time to submit additional depositions and affidavits in opposition to plaintiff's motion for summary judgment.

Whether defendant's last named motion should be granted or not depends upon a determination of whether the proposed or prospective evidence would have a material bearing upon a decision of the ultimate issue in controversy. This requires a rather extensive review of the pleadings and factual matters now in the record.

The ultimate issue to be decided in this case is the validity and constitutionality of defendant's application of Chapter 12, Title 49 of the Idaho Code, dealing with motor fuel taxes, to the facts of the particular transaction involved in this action. Defendant has collected the excise tax provided for by Section 49–1210 I.C. from plaintiff, under the theory that the gasoline in question was "received" by plaintiff under the provisions of Section 49–1201(g)2, I.C., which provides in its essential parts:

> Motor fuel imported into this state other than that placed in storage * * * shall be considered received immediately after the same is unloaded and by the person who is the owner thereof at such time if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owned

such fuel immediately prior to its being unloaded; provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncancelled dealer's permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; *further provided that motor fuel that is in any MANNER supplied, sold, or furnished to any person or agency, whatsoever, not the holder of an uncancelled Idaho dealer's permit, by an Idaho licensed dealer, for importation into the state of Idaho, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such fuel immediately after the imported motor fuel has been unloaded in the state of Idaho.* * * *

4. Motor fuel acquired in this state by any person, other than as set forth in paragraphs (1), (2) and (3) of this subsection, shall, unless the person from whom the same is acquired has with respect thereto paid or incurred liability for, or the burden of, the tax imposed by this chapter or unless the same shall be exempt * * * be considered to be first received by the person so acquiring the same at the time so acquired. [Italic mine.]

In general terms, the facts now established without controversy are, that in June, 1959 the General Services Administration of the U.S. Government issued an invitation for bids for furnishing gasoline to certain governmental agencies in the states of Montana, Idaho, Oregon and Washington for the period of November 1, 1959 through October 31, 1960; that in said invitation were items covering the purchase of gasoline for the Atomic Energy Commission and National Reactor, at Idaho Falls, Idaho; that on October 28, 1959 plaintiff's bid was accepted and GSA formally awarded the contract to plaintiff at Seattle,

Washington, under bid items 63A and 64A. The gasoline was sold at a designated price, f.o.b. Bulk Plant, Salt Lake City, Utah. Pursuant to the terms of the contract the A.E.C. was the ordering activity, and upon order of the A.E.C. or its operating company, Phillips Petroleum, plaintiff delivered some 1,436,355 gallons of gasoline to common carriers selected by the A.E.C. or its operating company, Phillips Petroleum Co., who transported it to Idaho Falls, where it was placed in A.E.C. owned storage tanks and used in A.E.C. operations in Idaho. Part of such use was the operation of government owned buses for transportation of workers to the NRT site over Idaho state highways; that by a contract between the A.E.C. and Phillips Petroleum Co., most of the actual operation is done by Phillips.

Because plaintiff was at all times a holder of an Idaho dealer's permit pursuant to Title 49, Chapter 12, Idaho Code, and the A.E.C. was not, defendant insisted that plaintiff pay the tax imposed by Section 49–1210 I.C., under the theory that plaintiff was a "receiver" of this gasoline pursuant to the provisions of 49–1201(g)2, providing that motor fuel

> supplied, sold or furnished to any * * * agency, not the holder of an uncancelled Idaho Dealer's Permit, by an Idaho licensed dealer, for importation into the state from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, immediately after the imported motor fuel has been unloaded. * * *

It seems clear that the transaction above outlined falls within the terms of the statute, and if the statute or its application here is valid, then the tax is proper. Plaintiff contends that the provision is unconstitutional and invalid, as here applied, in that the 14th Amendment, the Commerce Clause and the Supremacy

Clause of the U.S. Constitution are violated; as is the Due Process Clause of the Idaho Constitution. Plaintiff has paid the taxes in question with appropriate protests, and now seeks reimbursement together with interest.

Defendant contends that there may be additional facts which he will be able to present on trial or with further discovery, which are necessary to a decision of this case. As revealed by defendant's affidavits, these facts will be that the gasoline here involved was consumed in the state of Idaho by Phillips Petroleum Co. in the furtherance of its management contract with the A.E.C., by which Phillips operates certain motor vehicles over Idaho highways to transport employees of various private corporations to the NRT near Arco, Idaho; that Phillips Petroleum charges a fee for transportation of such employees; that the gasoline is delivered to the custody of Phillips at Idaho Falls and is there introduced into the various vehicles by Phillips. It should be noted that defendant does not controvert or contend that he can controvert the affidavits of W. A. Erickson that the vehicles in question are solely owned or leased by the A.E.C. and that the fees received by passengers are the property of the U.S. Government or A.E.C.

In the final analysis, defendant contends that on trial or after additional discovery he can show in substance that the overall transaction is the sale of gasoline by plaintiff to Phillips Petroleum Co. for use in operating motor vehicles over the highways of the state of Idaho. (Page 3 defendant's brief on motion to dismiss summary judgment.)

Defendant contends also that he may be able to show that there was a collusive agreement between the A.E.C., Phillips Petroleum and plaintiff, by which

they established the procedures in question to avoid payment of the Idaho Fuel Tax.

It appears to me that the proposed evidence of defendant can only become material in this case if the tax in question be considered a "use tax" in the usual sense. This appears to be defendant's position also, because he relies for the most part on "Sales and Use Tax" cases, i.e.; *General Trading Co.* vs. *State Tax Commission,* 332 U.S. 335, 88 L. Ed. 1309; *Miller Bros. Co.* vs. *Maryland,* 347 U.S. 340; 89 L. Ed. 744; *Scripto, Inc.* vs. *Carson,* 4 L. Ed. 2d 660; *McGoldrich* vs. *Borwind White Coal Mining Co.,* 309 U.S. 33; *McGoldrich* vs. *Felt & Tarrant Manufacturing Co.,* 309 U.S. 70. In each of these cases a "sales" or "use" tax was involved which placed the incidence of the tax and the economic impact of the tax on the ultimate buyer or consumer, in clear and certain terms, and the states were allowed to require an out-of-state vendor to "collect" it for them. The usual use tax is a defensive tax by a state to support a retail sales tax, and taxes the use, consumption or storage of a particular commodity. A good example of what I consider a true use tax to be, is our Idaho Special [Fuels] Use Tax (Section 49–1231 I.C.), which levies an "excise tax of 6 cents per gallon on the use of special fuel in any motor vehicle while operated upon the highway * * *." The tax is collected by the special fuel dealer, and clearly falls on the user or consumer in its ultimate impact.

The "gasoline" fuel tax statute with which we are here involved, however, is ambiguous, as regards its true nature. By Section 49–1210 I.C. it places the tax directly upon the dealer and requires him to:

> pay an excise tax of 6 cents per gallon on all motor fuels "received" as defined by Section 49–1201 * * * less the deductions and credits authorized, * * *

which are (A) exported fuel (49–1215), (B) aviation fuel, (C) exempt use (non-highway) and (D) 2% shrinkage and expense reimbursement, one-half of which must be passed on to the actual dealer.

While the term "received" has varying meanings as used in 49–1201, the end effect is to place the burden of the tax directly on the licensed dealer except as provided in subsection (g)4 when there is no licensed dealer. The tax is basically upon a licensed dealer's privilege of first owning motor fuel in the state of Idaho for the purpose of sale, delivery, or consumption of the same in the state, except in a factual situation such as is here involved.

However, there is an indication that the legislature felt that the ultimate impact of the tax would be on the consumer of the fuel when it allowed a claim of refund by the purchaser-consumer for non-highway use (49–1218 I.C.), and made no provision for the licensed dealer to claim such refunds unless he personally used gasoline for non-highway purposes (49–1210(e)). This is the only indication in the Act that the excise tax is a special sales or use tax on the consumer in the usual sense. However, the dealer is not in any way required to pass the tax on or collect it from the consumer, and the ultimate purchaser or consumer has no responsibility whatsoever for payment of the tax. While it may be the overall policy of the state to collect a tax of 6c per gallon on all gasoline used to propel motor vehicles over Idaho state highways, the taxable event or transaction is not the use by the local consumer or purchaser, but the "receipt" of the gas by the dealer. It cannot be said under this statute that the licensed dealer is the mere collector of a tax from the purchaser or user, as was the holding in each of the cases relied upon by the defendant (supra). The

Idaho administrative interpretation of the statute in the past has been to treat it as a privilege tax upon the dealer and not as a sales or use tax on the consumer. I conclude this is the correct interpretation.

It follows, then, that the evidence which defendant feels he may be able to produce, would not be material to a decision of this case, because if it is not a "use tax," it becomes unimportant who was the actual purchaser. Therefore, defendant's motion to dismiss the summary judgment or to give him additional time to produce proof of this nature for purposes of the summary judgment motion should be denied.

If the tax in question cannot be justified as a "use tax," it is under the facts of this case a tax on a privilege which is exercised and performed wholly outside of the state of Idaho, and is a violation of the Commerce Clause and Due Process of Law. It is clear that the contract in question was wholly made, executed and performed outside the state of Idaho. The only incidents which connect the state of Idaho with the transaction at all are (1) the circumstance that plaintiff happens to be a licensed dealer in Idaho—if it were not, Idaho would have no hold on it whatsoever; and (2) the gasoline, the legal title to which passed to either the U.S. Government or Phillips Petroleum Co. outside the state of Idaho, was imported into the state by its owner.

The U.S. Supreme Court decision which involves a situation closest to the facts of this case, in my opinion, is *Norton Co.* vs. *Dept. of Revenue of the State of Illinois,* (1951) 340 U.S. 534; 95 L. Ed. 517. In this case the Norton Co., whose home was in Massachusetts, was authorized to do business in Illinois and maintained a warehouse and branch office in Illinois. Part of its sales were made locally and a part were

by direct order to the Massachusetts office and shipped directly to Illinois purchasers in interstate commerce. The Illinois tax was on "persons engaged in the business of selling tangible personal property at retail in" Illinois, and the U.S. Supreme Court said:

> Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. McLeod vs. J. E. Dilworth Co., 322 U.S. 327, 88 L. Ed. 304, 64 S. Ct. 1023, 1030. *Of course a state imposing a sales or use tax can more easily meet this burden because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor.*
>
> But when, as here, the corporation has gone into the state to do local business by state permission and has submitted itself to the taxing power of the state, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature. [Italic mine.]

It is my opinion that plaintiff in the case at bar has clearly shown that the transaction in question is "dissociated from [its] local business and [is] interstate in nature." It appears to me that Idaho in this instance is attempting to levy the tax on the privilege of doing interstate business, in violation of the U.S. Constitution. *General Trading Co.* vs. *State Tax Commission,* 322 U.S. 335; *McLeod* vs. *J. E. Dilworth Co.,* 322 U.S. 327.

In addition, under the facts of this case I am of the opinion that there is a denial of due process to plaintiff as the result of the levy of the tax, because the tax is really levied on a privilege exercised in Utah and derived from the laws of that state. There is insufficient "nexus" between plaintiff and the

State of Idaho. See *Miller Bros.* vs. *Maryland,* 347 U.S. 340, 98 L. Ed. 744, wherein the Supreme Court said:

> If there is some jurisdictional fact or event to serve as a conductor, the reach of a state's taxing power may be carried beyond its borders. When it has the taxpayer within its power or jurisdiction, it may sometimes, through him reach his extraterritorial income or transactions, and it may sometimes, through these reach the non resident. * * *
>
> Due process requires some definite link, some minimum connection between a state and a person, property or transaction it seeks to tax.

See also *Connecticut General Life Ins. Co.* vs. *Johnson,* 303 U.S. 77; and *James* vs. *Dravo Contracting Co.,* 302 U.S. 134, and similar cases cited by plaintiff in its brief.

Thus in summary I conclude that the tax in question is basically a tax on the privilege of licensed petroleum dealers to own gasoline in Idaho for sale or use in Idaho, and that it is not a use tax, the impact of which is on the local consumer. As such, the tax as here applied to a sale made in Utah is a tax on interstate commerce and a violation of due process of law, in that it taxes a privilege of plaintiff exercised outside of Idaho's jurisdiction.

Lastly, I would point out that if defendant's theories as to the ownership of the gasoline at the time of its importation into the state of Idaho are correct, that is, that Phillips Petroleum Co. was the true owner, this gasoline need not escape taxation, because Phillips would be clearly liable for it, but this plaintiff would not. Phillips could be said to have received it under 49-1201(g)2 I.C., if it is a

licensed dealer, or if it is not a licensed dealer, it could be held under 49–1201(g)4 I.C. If the U.S. Government was the true purchaser and owner, plaintiff would not be liable for the tax, even if I am in error and it is a use tax on the consumer, because of federal government immunity. If it is a privilege tax on plaintiff, as I here hold, its application in this case is still unconstitutional, regardless of the ownership of the gasoline at the time of its importation, unless plaintiff owns it.

Thus I conclude that plaintiff is entitled to a summary judgment for a refund of the tax paid herein, but as defendant has pointed out, the issue of right to interest has not been presented to me. I feel the parties should be granted an opportunity to present their views thereon. I will therefore hold up entry of summary judgment until counsel has presented their views on this issue. Please consult and advise me how you wish to do this.

Dated this 20th day of June, 1961.

MERLIN S. YOUNG,
District Judge.

Judgment of the Supreme Court of the State of Idaho

No. 9113

THE AMERICAN OIL COMPANY, A MARYLAND CORPORATION, PLAINTIFF-RESPONDENT, AND CROSS-APPELLANT

v.

P. G. NEILL, FORMER TAX COLLECTOR OF THE STATE OF IDAHO, AND FLOYD WEST, ACTING TAX COLLECTOR OF THE STATE OF IDAHO, DEFENDANTS-APPELLANTS, AND CROSS-RESPONDENTS

Justice McFadden announced the decision in this cause June 20, 1963, that the judgment of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, is reversed and the trial court is instructed to dismiss the action.

Subsequent to the announcement of this decision the Court regularly granted Respondent and Cross-Appellant's application to stay execution of the judgment on remittitur until after October 7, 1963, in order to enable Respondent and Cross-Appellant to apply to the Supreme Court of the United States of America for a Writ of Certiorari or to perfect an appeal of this cause to said Court.

The trial court is therefore directed to withhold dismissal of this action until October 7, 1963. Costs to appellants.

IT IS NOW THEREFORE SO ORDERED.

I, L. J. Bideganata, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the judgment entered in the above entitled cause July 11, 1963, and now of record in my office.

WITNESS My hand and the seal of this Court, July 11, 1963.

/s/ L. J. BIDEGANETA,
Clerk of the Supreme Court,
State of Idaho.

APPENDIX B

The pertinent portions of the Idaho Motor Fuels Tax Act, as amended, 9 Idaho Code 49–1201 *et seq.* (1963 Cum. Pocket Supp.) are as follows:

49–1201. *Definitions.*—The following words, terms and phrases in this chapter, are, for the purpose thereof, defined as follows:

* * * * *

(c) The word "person" includes any individual, firm, co-partnership, association, corporation (both private and municipal), or other group or combination acting as a unit, and the plural as well as the singular number, unless the intent to give a more limited meaning is disclosed by the context.

(d) The term "dealer" shall include any person, as hereinabove defined, who first receives motor fuels in this state within the meaning of the word "received" as hereinafter in this section defined.

* * * * *

(g) Motor fuel, for the purpose of determining liability for the payment of the tax imposed by section 49–1210, shall be considered to be "received" in the following cases:

1. Motor fuel refined at a refinery in this state and placed in tanks thereat or motor fuel transferred from points outside this state or from a refinery or pipe line terminal in this state and placed in tanks thereat shall be considered to be received when such fuel is withdrawn from such refinery or terminal storage for sale or use in this state or for transportation to destinations in this state other than for transfer to other refineries or pipe line terminals

in this state, and not before. When withdrawn from such refinery or terminal storage such motor fuel shall be considered to be received by the person for whose account such motor fuels were withdrawn if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owns such fuel immediately prior to its withdrawal from said storage.

2. Motor fuel imported into this state other than that placed in storage at refineries or pipe line terminals in this state shall be considered to be received immediately after the same is unloaded and by the person who is the owner thereof at such time if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owned such fuel immediately prior to its being unloaded: provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; further provided that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho. * * *

* * * * *

49–1202. [1957 ed.] *Application for permit—Contents—Issuance of permit to dealers—Fee.*—It shall be unlawful for any dealer to import, receive, use, sell or distribute any motor fuels or to engage in business, as a dealer in motor fuel, within this state unless such dealer is the holder of an uncancelled permit issued by the commissioner to engage in such business. * * *

* * * * *

49–1210. *Report of motor fuel received—Excise tax.*—(a) In addition to the taxes now provided by law, each and every dealer, as defined in this chapter, shall, not later than the twenty-fifth day of each calendar month render a statement to the commissioner of all motor fuels received, as the term "received" is defined in section 49–1201, during the preceding calendar month, and pay an excise tax of six cents per gallon on all motor fuels as provided in subsection (b) of this section. * * *

(b) At the time of filing each monthly report each dealer shall pay to the commissioner an excise tax of six cents per gallon on all motor fuels "received," within the meaning of the term "received" as defined in section 49–1201, by such dealer during the next preceding calendar month, less the deductions and credits authorized in this chapter. * * *

* * * * *

49–1218. *Refunding of tax.*—Any person who shall buy fifty gallons or more and use any motor fuel for the purpose of operating or propelling stationary gasoline engines, tractors or motor boats engaged in commercial uses other than fishing, or for cleaning or dyeing or other use of the same, except as otherwise provided by law, and except in any motor vehicle re-

quired to be registered by the provisions of the uniform motor vehicle registration act, or exempt from registration by reason of ownership or residence and except an aircraft, and who shall have paid any excise tax on such motor fuel hereby required to be paid, whether directly to the vendor from whom it was purchased, or indirectly by adding the amount of such excise tax to the price of such motor fuel, shall be entitled to be reimbursed and repaid the amount of such excise tax so paid by him * * *

* * * * *

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